said corporation from doing exactly what it did do. In Kentucky, the said Respondent District Judge well knew that the action could be continued in the name of the Morris Wholesale Liquor Distributing Company, Inc., without the consent of Edward Morris, and that in construing the statute the highest court of Kentucky had construed its provision—"the action may be continued by or against the original party or suitor; and that if motion was presented for filing a petition that allowance of its filing and issuance of summons was a matter of right in the aggrieved party. Said summons may not be issued until a petition is filed." Petition was not allowed.

That the Federal rule is the same, and this fact MAY explain the order of March 4th 1940, without an order dismissing Harvey H. Smith as counsel, which order would have brought a mandamus promptly for a hearing of petitioner's rights and all of the attendant facts. Thus the rights under due process were denied to your petitioners, 5th and 14th amendments. No order has been filed by the court dismissing Harvey H. Smith as attorney.

STATEMENT OF JURISDICTIONAL GROUNDS

(m) That it was the law of Kentucky that said petition to make your petitioners parties *to said action was a matter of right;* and that they were entitled to judgment against the Commonwealth of Kentucky, and James W. Martin, because of the fact that the plaintiffs had not revived their action as provided by law.

The Petitioners allege as specific grounds for jurisdiction:

(1) That parties Plaintiff below were totally in default six months after the month of March, 1938.—Rule 60.

(2) They were in default of revivorship after July 1st, 1939, at all times.—Rule 25, Statute U. S. C. A. 780.

(3) Judgment entered April 29, 1940, is a void judgment for want of parties to the action, plaintiffs having disappeared as parties, and the Court having disallowed cross-petitioners to proceed; dismissing their said petition on the motion of a stranger to the record. The Morris Wholesale Liquor Distributing Co., Inc., could not and did not make a motion of its own authority and power as a corporation, but Ed Morris.

(4) The Court, without jurisdiction, took possession of the assets of $3000 of whiskey and/or liquors and disposed of it by a void order from which no appeal could be taken by petitioners, and having been refused Mandamus by Circuit Court of Appeals, these petitioners have no other remedy except by writ of Certiorari.

(5) The action proceeded ex parte after the six months' litigation statute, federal rule and statute, and the denial of judgment was a denial of due process, and a denial of the administration of the laws of Kentucky and the United States.

(6) The denial of a trial of the issues as made is a denial of the trial by jury under the 7th Amendment to the Constitution of the United States and

Section 7 Bill of Rights of Kentucky and the 5th and 14th Amendments. (U.S.C.) United States Constitution.

(7) The denial of the right to be heard and by due notice to Houston, Langdon, known parties in the proceeding, and a denial of their motion to be made parties, and their constitutional right to have service and summons on their petition, is a denial of protection.—14th and 5th Amendments U. S. Constitution.

(8) A denial of their right to be heard is a denial of their contract with the Morris Wholesale Liquor Distributing Company, Inc., in which they advanced money with no opportunity to be heard in a proceeding in said court on said subject matter of import as well as consumers' taxes, both of which were illegal, collected in violation of law, and in violation of Article 1, section 8, of the Constitution of the United States.

(9) The denial of the filing of pleadings under the rules of law is and was a denial of the equal protection of the laws in this respect and in the above respects, and thereby deprived them of their property without just compensation therefor, and did deny them of their constitutional right to sue on their said contract entered into May 15, 1938, with Morris Co. for a cash consideration already paid, and thus impaired the same, contrary to the Constitution of the United States, 5th and 14th Amendments.

(10) That appellate jurisdiction lies in this court from the Circuit Court of Appeals, and the United States District Court for the Eastern Dis-

trict of Kentucky, and appeal has been denied by said District Court, and Appellate Court has denied Mandamus.

(11) That the action of said District Court in allowing evidence to be introduced by plaintiffs and not by defendants after judgment rendered, March 4, 1940 and April 29, 1940, is a denial of due process and of the 5th and 14th Amendments.

(12) That the action of the court refusing to hear the facts on the motion to dismiss counter-claim and to allow the petition for parties, was a violation of the decisions of the Supreme Court of the United States, as announced in Ex Parte Yerger, 8th Wall. 85—101—103, and an absolute repudiation of Section 7 of the Bill of Rights of the Constitution of Kentucky, and a repudiation of the doctrine of the law as established by the Supreme Court of the United States, in 287 U. S. 94, in the case of Schoenthal vs. Irving Trust Co., whereby it is established that on the question of the trial of money payments which are certain and definite under Section 267 Judicial Code, the trial of these issues under the laws of Kentucky is a matter of constitutional right, and the said Respondent there and then at all times attempted to and did sustain what he considered an equitable practice in the Federal courts—denying a Common law hearing.

(13) Section 267 of the Judicial Code provides that suits in equity shall not be sustained in any court of the United States in any case where there is a plain adequate and complete remedy that may be had at law. 28 U. S. C. A., section 384. And the

said Respondent repudiated the doctrine established in Erie Railroad vs. Thompson, 304 U. S. 64, wherein it is decided on principle that the United States District Court in this cause wholly disregarded the law of Kentucky, which as above recited, controlled its action in respect to the obligation of contract which was entered into between all of the suitors and to be performed within the state by a due process hearing of collecting taxes which were unlawfully seized by James W. Martin, then Internal Revenue Collector; and the Court repudiated section 28 of the Constitution of Kentucky, and the decisions of the courts of Kentucky thereunder wherein it was held that the Legislature has no power by the enactment of the statute, (a statute of March 7, 1938,) to change or affect or modify the rights of litigants in matters then pending in the courts—all tax matters arising under Act of 1934.

(14) That all of the taxes alleged to have accrued to the said James W. Martin, as Internal Revenue Commissioner, and the Commonwealth of Kentucky from the Morris Wholesale Liquor Distributing Co., Inc., accrued before March 7, 1938, under the Act of the Legislature of 1934, known as the Kentucky Alcohol Control Act. That when said Act was repealed on March 7, all litigation then pending under a statute that provided penalties, automatically ceased to exist; and that the effect of the decision of this court to deny these facts pleaded and tried according to the laws of Kentucky was a denial of due process, the said court knowing that these parties to this agreement of May 15, 1938, could proceed for all of the parties in Kentucky who had paid unlawful import taxes and unlawful consumers'

taxes into a common fund then in the hands of the State of Kentucky; and that the determination of this right was to be proven by facts; and under Section 7 of the Bill of Rights of the Constitution of Kentucky, they were entitled to trial by jury; the controlling law at said time that must be applied under the decisions of the Supreme Court of the United States, in Erie Railroad Co. vs. Thompson, Supra, was totally ignored by the court. Section 24 of the Code of Kentucky provides that parties who are united in interest *must* be joined as plaintiffs or defendants, and a jury is guaranteed by 7 of its Bill of Rights and U. S. Constitution, Amendment 7.

(15) Your petitioners allege that under the laws of Kentucky where said contract to collect the said funds, held by the Commonwealth of Kentucky, as between the claimants, for relief, was one action, where one individual might sue for all, and that no valid judgment could be rendered where it was brought to the attention of the court that actual parties existed but were not parties to the suit in case of breach of one party, the suitor.

(16) That it was the law of Kentucky, that where a fund is in the hands of the State or a court, the court must try the title of ownership of said fund to a jury, and the officer seizing the fund claimed, must make his answer to the court to show what authority he has at said time to attach or claim interest in said property.

(17) That under the law of Kentucky, no such attachment as here can be sustained, and in view of the fact that your petitioners, through Morris Whole-

sale Liquor Distributing Co., Inc., made a motion to make the auditor a necessary party to this action, whose duty it is to make investigations under the law to determine whether claims are just or unjust was complete evidence that the auditor had not given his consent to said suit: and judgment of the court on the 29th day of April, 1940, disposing of the liquors seized at said time is a void judgment for want of his consent. Act of 34, Sec. 10. Stat. Ky. 112-5.

(18) That the filing of a petition to substitute parties is a matter of right under the laws of Kentucky, and this right to establish petitioner's right and title to the property is a constitutional right secured by Sections 20, 21 and 22 and other provisions of the Code. (Carroll's)

(19) And furthermore, it is the Law of Kentucky:

(Quoted in Substance)

> "If the right of the plaintiff is assigned during the pendency of the action, it may be continued in his name; or the court may allow the person to whom the transfer or assignment is made to be substituted in the action."

Section Code (Ky.) 25

> "If the transfer of a right to chose in action is made during the pendency of an action after notice of transfer or claim of any rightful party, and any settlement is made between the litigant party and the adverse actual parties, a judgment of the court upon such an agreement is void."

That in said judgment of April 29, the actual parties and the Attorney of record were neither notified, nor had they agreed to such judgment, and that

the right of trial by jury on all the issues of fact precipitated by petitioners application to file an intervening petition, so that they might be made parties in the suit to defend the respective interests of all the parties in the contract of May 15, 1938, being denied by the court, made the judgment of the court void or voidable.

(20) That under the laws of Kentucky the action of the court in rendering judgment on a motion to dismiss on the 4th day of March, 1940, without the consent of Harvey H. Smith, or a proper hearing, and followed by a judgment of April 29, settling the entire controversy, is a denial of due process and contrary to the laws of Kentucky—7 Bill of Rights.

That the Honorable Mac Swinford ignored and refused to consider the fact that the said attorneys and the said James W. Martin had, as a matter of law, decided by the highest court of Kentucky, no right to appear in said action, and were automatically removed from said action as plaintiffs, when they failed, within six months, to revive said action in the name of the successor of James W. Martin.

(n) That thereafter, the said Harvey H. Smith, on March 4th, demanded an open hearing by wire to the Honorable Mac Swinford, who ignored the said wire and entered the order afore-alleged. That this order was entered on March 4th, 1940, but thereafter the said, the Honorable Mac Swinford, refused to petitioners and Harvey H. Smith, a hearing; and in order to sustain his order of March 4th, dismissing your petitioners' counter-claim, he personally, from

the bench, sitting in court at Covington, Kentucky, on April 1st, ordered the said Edward Morris and the said James W. Chapman to present a resolution from said corporation affirming the action of the said Edward Morris, and therefore the action of the court, entering an order on March 4th, dismissing the counter-claim of your petitioners through and by the Morris Wholesale Liquor Distributing Co., Inc., was void, and because under the decisions of the United States Courts and the Courts of Kentucky a layman cannot appear for a corporation, nor can such an order be entered out of Court.

(o) That at said time the issues had been closed, and, that the court had made an opinion finding on April 1st, 1940, that the corporation had been *"dissolved,"* but on April 8th or thereabouts, as appears from the record, a meeting of said corporation in the city of Ashland, Kentucky, was held, called by one Olin, who was not an officer of said corporation, affirming the action of the said Edward Morris, which under the law of Kentucky, Kentucky Statutes 671, cannot have any force for any reason or purpose. In the first place it is aliunde evidence presented to a court after judgment. In the next place, as petitioners allege, the corporation had no authority to pass said resolution until and when it had cancelled the power of attorney to the said Harvey H. Smith, *under the laws of Kentucky,* but the said court refused to have said open hearing resulting that the said Harvey H. Smith could not cross-examine said Edward Morris, the said J. W. Chapman and the said Olin, to determine whether or not a fraud had been practiced on the Honorable United States District Court.

(p) That thereafter, notice of appeal was filed with the Clerk of said District Court, from all of these orders which the Judge had made in chambers; and also a motion to hear and determine a bill of exceptions, in order that these pleadings that were not a matter of record might be included as a part of the record. That the court refused and denied said motion, and made a finding that he had denied a bill of exceptions in the case, which had never been presented to the court by your petitioners, or Harvey H. Smith, *but only a motion for such a hearing.* The refusal of a Bill of Exceptions in Kentucky voids the judgment.

(q) That it is the law of Kentucky that a motion for a Bill of Exceptions always lies to include, in the files of said cause, any pleading that has been offered and rejected by the court or any evidence that has been admitted or denied by the court. And your petitioners allege that under the laws of the United States, it was the duty of the Honorable Mac Swinford to allow said hearing and to determine whether said Bill of Exceptions should be settled by him or not, and if he refused to grant said hearing, to enter a proper order or finding based upon the applications then presented to the court when either party to the litigation demanded it.

(r) That in furtherance of the plan and scheme to secure a judgment in this case by the said Martin and the said Reeves, and their attorneys, an agreement was prepared whereby the said Edward Morris and the Morris Wholesale Liquor Distributing Co., Inc., should pay to the State of Kentucky in satisfaction of their claim, the sum of $500, when as a

matter of fact, and as a matter of law, the said Morris Wholesale Liquor Distributing Co., Inc., was entitled to a judgment of approximately $22,000, the plaintiffs being in default, both in pleadings and in default as a party plaintiff—against the Commonwealth of Kentucky.

(s) That on May 15, 1938, the entire claim of the said Morris Wholesale Liquor Distributing Co., Inc., was assigned to trustees, your petitioners, George S. Houston and Hargis Langdon, both of whom had claims against the said Commonwealth of Kentucky for taxes unlawfully paid to said Commonwealth, both import and domestic. That at and after the time said agreement was made, the Morris Wholesale Liquor Distributing Co., Inc., had no legal interest in its said claim against the Commonwealth of Kentucky because the title to the same was in the said trustees. *That no judgment can be rendered in a cause of action of this character until and when the trustees are served in said* action, if the facts shall become known to the court, but the court entered a judgment on an agreement between the plaintiffs, James W. Martin and H. Clyde Reeves, and the Morris Wholesale Liquor Distributing Co., Inc., settling all claim that the Morris Wholesale Liquor Distributing Co., Inc., had against the Commonwealth of Kentucky, amounting to approximately $22,000. That at said time your petitioners had an interest in the liquor possessed by the Commonwealth of Kentucky and these assets were in the possession of the United States District Court, which had taken its jurisdiction from the Franklin Circuit Court; (Ky. Code Section 80). That there were other questions, the question of service of summons, of the ser-

vice of attachment, affecting the jurisdiction of the Franklin Circuit Court, when said attachment was sued out, which as a matter of right, under Federal, and State law of Kentucky, must be determined by the United States District Court. Franklin Circuit Court has no jurisdiction to enforce criminal penalties under Criminal Statutes decided by Court of Appeals. That the Honorable Mac Swinford refused to determine any one of these questions at an open hearing, but without such hearing, denied a motion to dismiss said attachment and to enter into a consideration of said question of jurisdiction of said Franklin Circuit Court, which rulings of the court are filed herewith and made a part of this petition, Exhibit S. Statute, Section—4028-9 and 4281, Code Section 489.

SEE EXHIBIT "X" FOR ED MORRIS MOTION

As stated, the Franklin Circuit Court had no jurisdiction because penalties were sought to be collected under a statute which provided for criminal imprisonment. If the offense is an indictable one either by information or by grand jury, the penalties must be collected as in any other civil action where the debt may be denied, not by denial and answer, but by a plea of "not guilty," as decided in L. & N. vs. Commonwealth, 112 Ky. Rep. 643, and 77 Ky. Rep. 625. In other words, the trial by jury is guaranteed in order to determine whether there is any basis for the penalties. This is done ordinarily by a plea of "not guilty," which the defendant has the opportunity to present. When the penalty is imposed, then an action may be brought, but until then the court will have no jurisdiction unless it is alleged and

shown that such action had been taken on the authority of the Auditor. Therefore, the Franklin Circuit Court had no such jurisdiction by reason of the imprisonment clause in the act of 1934 or 1936 and if it be construed to be a civil action, then the procedure must be to collect the penalty by fine, and a plea of not guilty may be interposed by the defendant, and if it is adjudicated that the penalty has accrued then suit may be brought and attachment may be had to collect penalties; otherwise, it cannot be collected. Suit for penalties must be brought by the State Auditor, not by Commissioner *under the* 1934 Act and Sec. 112-5 and 4169 Stat.

The imprisonment clause is as follows:

SECTION 22, ORIGINAL LICENSE ACT: (1934) PENALTY CLAUSE

> "In addition to the remedies herein granted, the Commonwealth for such violations, any person who shall violate any of the provisions of this act will also be deemed guilty of a misdemeanor and punished by fine of not less than $50.00 nor more than $1000.00, or by imprisonment of not less than 30 days nor more than one year, or by both such fine and imprisonment."

AUDITOR MUST SUE.

> Section 10 of the Original Act 1934: "On the failure of any person, liable therefor, to pay the taxes imposed herein within fifteen days after the same has become due, he or they shall be deemed delinquent, and a penalty of twenty per cent on the amount of license tax due shall attach, and the *Auditor* shall at once cause such proceedings to be instituted for the collection of such license, with such interest and

penalties as may be provided by law for the collection of other taxes."

The *Auditor* did not authorize the suit or the penalties, against the Morris Wholesale Liquor Distributing Co., Inc., *so the procedure on this ground was void.* Revenue Commissioners had no authority —See Exhibit "Y". Atty. Gen. must be a party.

(t) That on or about the 29th day of April, 1940, this agreement was entered into and filed before the Honorable Mac Swinford, who then entered a judgment thereon confirming said agreement, so that by said agreement it was thought and believed, as your petitioners allege, that your petitioners and all persons who had joined in the agreement of May 15, 1938, would be estopped and barred from recovering their said taxes from the Commonwealth of Kentucky, it being provided in the Act of 1934 that all such actions should be brought within two years from the time of the payment of said taxes, and that this action had been brought within two years from the time of the payment of the taxes; and although the Honorable Mac Swinford knew and understood that the said James W. Martin, at the time said agreement was made, was not a party to said action, and had been dismissed as plaintiff by operation of law, and knew that the Commonwealth of Kentucky could not in itself, without an officer, maintain said action, and knew that H. Clyde Reeves had not been made a party to this action, within the knowledge of your petitioners or the attorney for the Morris Wholesale Liquor Distributing Co., Inc., nor had any motion or order dismissing him as attorney, been made, nor any service been had upon

the said Harvey H. Smith, or your petitioners or the Morris Wholesale Liquor Distributing Co., Inc., at any time, but he permitted said filing of said agreement as his judgment as Judge to pre-adjudicate said claims, denying your petitioners a hearing.

(u) That it is the law established by the Court of Appeals in Kentucky, the highest court in Kentucky, that each and every corporation doing business in Kentucky must qualify to do and perform that business by appointing a service agent in said state upon whom service may be had. If the corporation refused to appoint said service agent, the contracts made by it may be enforced against it, but it shall have no right to bring a suit or to defend a suit against any other party or person or corporation. That as soon as your petitioners discovered, from the Secretary of the State of Kentucky, that no such qualification had been made, they immediately filed their motion to the Clerk in the United States District Court of the Eastern District of Kentucky for leave to file their petition to make themselves nominal, as well as actual parties to this action, reviving and substituting the cause in the name of parties plaintiff in interest, who under the Code of Kentucky were the actual parties to this action. Sec. 976, Stat.

(v) That the Honorable Circuit Court of Appeals and the Honorable United States District Court, Respondents hereto, knew and understood that under the laws of Kentucky that said taxes had been illegally collected on all liquors imported into Kentucky, and under the following statute: (Act of April 30, 1936). (Also privilege tax of 5 cents).

> "It shall be unlawful for any person to ship or transport, or cause to be shipped or transported into the State of Kentucky, any distilled spirits from points without the state of Kentucky, and without first having obtained a permit from the State Tax Commission, so that payment of such taxes and permit fees as are required by law have been paid and shall accompany said shipment.
>
> "Distilled spirits manufactured in Kentucky purchased and shipped outside of the State of Kentucky, and then reshipped into the State of Kentucky, *is subject to the* 5 *cent per gallon import tax.*
>
> "Nothing in this Act shall be construed to require the payment of the tax more than once."

They also knew, and it was made to appear to them, that the Tax Supervisor of Kentucky, Joe B. Williams, had testified to the following:

> "The wholesaler must purchase a permit before importing the liquor into the State, and in this way the taxes are paid (before the movement of the merchandise into the State)."— Exhibit "T".

Each of said Respondents knew and understood that the 3rd section of the Constitution of Kentucky prohibited the levy of any taxes on any kind of property unless within the jurisdiction of Kentucky, and that no excise tax could be levied for the privilege of bringing any property into Kentucky, (as decided by the Court of Appeals of Kentucky).

They knew that the Kentucky Court of Appeals had decided, which decision was affirmed by the

United States Supreme Court in 305 U. S. 583 — J. Bacon & Sons case, that taxes may not be levied in Kentucky while merchandise is in transportation or before it is removed to within the jurisdiction of the State.

(w) That under the situation as it existed, and under the procedure adopted by the Honorable Mac Swinford, your petitioners applied to the Circuit Court of Appeals for the Sixth Circuit and asked that a mandamus be issued, ordering the said, the Honorable Mac Swinford, to vacate the order dismissing the counter-claim and to permit your petitioners to intervene in said action, as provided in their petition presented to said court, by the said motion to grant leave for them to intervene, it being a matter of right under the laws of the United States, and the laws of Kentucky at said time; and for other mandatory relief inherent in your petitioners, under the laws of Kentucky and the laws of the United States. That a motion for findings filed with the said Circuit Court of Appeals was denied without any findings on the part of the court, and a motion for findings by your petitioners was altogether denied by the court, as was the petition for re-hearing on the 15th day of May, 1940. That after the original petition for mandamus was denied, your petitioners filed application to the court for leave to bring up the cause of action pending before the Honorable District Court for the Eastern District of Kentucky by Mandamus or appeal from a final judgment, which the Honorable Mac Swinford declared had been entered by agreement of the actual parties qualified to appear in said court in said cause.

(x) That your petitioners are without relief and are without remedy, and that the arbitrary action of the Honorable Sixth Circuit Court of Appeals, denying said mandamus and denying petitioners' motion for findings, and the arbitrary action of the Honorable Mac Swinford, as alleged, present a cause to this Honorable Court for a writ of Certiorari. That your petitioners allege that under this hearing, before this Honorable Court, it will be found that the Act of 1934 and the Act of 1936, license and tax acts respectively, permit the filing of the cross-petition or an action to recover taxes collected in the manner in which they were collected in this cause. That your petitioners have a right to litigate said question, and they have been denied due process of law by the arbitrary action of the respondents and each of them, and they attach as Exhibits (A. to Y.) to their petition, and make the same a part hereof, showing the facts as alleged in their said petition and showing that without said acts referred to, your petitioners had the right under the laws of Kentucky to collect said taxes owing to them, either directly or by assignment.

Carroll's Code: (Revivor) Kentucky. (Quoted in Substance).

> Section 502. "If not made by consent, the order shall be served, in the same manner as a summons, upon the party adverse to the one making a motion, and the first term commences not less than ten days after such service, the party upon whom it is made may show cause against the revivor, and if sufficient cause be not then shown, the action shall stand revived. The order of the court reviving said action must

be duly entered by the court. The limitation of such revivorship in within one year from the date of the death of the party, (or separation from office)."

Section 511: "If the action is not revived, the opposing party may have an order to strike the action from the docket and for costs against the plaintiff." (See Motion to Strike, Feb. 14.)

(y) The petitioning parties hereto, by and through Harvey H. Smith, heretofore, on the 29th day of September, 1939, made a motion to dismiss said action, and followed it up thereafter, on the 14th day of February, 1940, tendered their motion to strike the motion of Edward Morris, and the order of the court sustaining his motion to dismiss the cross action, after March 4, 1940. Later, on February 9, 1940, the Honorable Mac Swinford, as Judge of said court, permitted, by order, the appearance of Sam Rosenstein, J. J. Leary, and J. W. Chapman, in the case, who by agreement worked together; the said Judge and the said attorney, then knowing that they were subject to a penalty for appearing in such cause, and also liable to damages for appearing in said cause, yet the said Honorable Mac Swinford gave no heed or attention to the rules of the Supreme Court of the United States or the laws of Kentucky, and refused, on March 4, 1940, on demand, by Harvey H. Smith for such a hearing, to grant such hearing; and entered forthwith an order dismissing the cross-petition and counter - claim of your petitioners, after refusing, on the 14th day of February to allow the filing of the motion for parties and the motion to strike; and by virtue of his order, thereafter continued said motion to

strike until after he did render order dismissing said action. That the action of the said Honorable Mac Swinford was in violation of the practice rules of the United States Supreme Court, and the laws of Kentucky, controlling this action, and his conduct thereby deprived your petitioners of due process of law, contrary to and repugnant to the 5th and 14th Amendments to the Constitution of the United States, and deprived them of the right of trial by jury on the issue of facts precipitated by said motion to strike, and his allowance of Edward Morris to appear in person in said court, the said Edward Morris being a layman, and attempting thereby to represent a corporation; and in order to bolster the judgment of the said Respondent, and then openly, from the bench, on April 1, 1940 ordering the said J. W. Chapman, who was not an attorney in the case, and the said Edward Morris, to require the Morris Wholesale Liquor Distributing Co., Inc., (dissolved) to present to him a resolution of said corporation, affirming the order which he had made on March 4th, 1940 which, in respect to this matter, was a final order, and thereupon, on the 8th day of April, 1940, a resolution, marked Exhibit J, attached hereto, was presented to said court, over the objection of Harvey H. Smith, who then and there had the sole right under the laws of Kentucky, and under the laws of the United States, to appear and defend said action in respect to your petitioners and all others interested as actual parties; this was done in spite of the fact that the said Respondent, the Honorable Mac Swinford, had made a finding, on April 1, 1940, that the said corporation had been "dissolved," Constituted an unjudicial proceeding. That at said time, the said

respondent knew and understood that under the laws of Kentucky, the Morris Wholesale Liquor Distributing Co., Inc., could not defend any action or prosecute any action, and that it was necessary then and there to preserve the money and the assets involved in the action, to substitute parties that might proceed according to law.

That on the 29th day of April, 1940, the said J. W. Chapman, pretending to represent the Morris Wholesale Liquor Distributing Co., Inc., and the said J. J. Leary and the said Sam Rosenstein and the said H. Clyde Reeves, who had never been made a party to this action, and the said James W. Martin, who had by operation of law disappeared as a party plaintiff in this action, to enter into an agreement to settle a claim, certain by default, of $22,000, for a pretended sum of $500, and thereby the said respondent placed the seal of the Honorable District Court upon such an agreement, knowing at said time that none of the parties had a right to appear, either for the Commonwealth of Kentucky or for the Morris Wholesale Liquor Distributing Co., Inc., and there entered said pretended judgment, settling the controversy between the Morris Wholesale Liquor Distributing Co., Inc., and the Commonwealth of Kentucky and James W. Martin, admittedly an outsider and stranger to the record, as was H. Clyde Reeves. This agreement was made, and this order was made, knowing the irregularities that had involved this case by the unlawful action of the said J. W. Chapman, the said Edward Morris, the said J. J. Leary, the said H. Clyde Reeves, the said James W. Martin, and the said Sam Rosenstein, all of the said attorneys being subject to a damage action and a fine for ap-

pearing in this cause, the said Sam Rosenstein and the said J. J. Leary, having no legal authority to impose H. Clyde Reeves or James W. Martin, as parties to this action, as a matter of law, nor to appear in this action, and the Respondent court, under the decisions of the Sixth Circuit Court of Appeals, Fordson vs. Jacks, 7 F. (2) 117, which had previously held that such a judgment without a party plaintiff was absolutely void.

That the respondent court, the Honorable Mac Swinford, as Judge, knew and understood all of these facts, and without giving a full and open hearing to your petitioners or to the said Harvey H. Smith, proceeded to endorse, by affirmation, the settlement of this cause and make it a judicial record in his court, which conduct of the said Honorable Mac Swinford was subject to review, as a matter of right, under a writ of Certiorari filed in the Circuit Court of Appeals for the Sixth Circuit, and not by appeal, and by mandamus. Three motions to dismiss—No Auditor—No Plaintiff—No Atty Gen.

That your petitioners filed a motion for findings and filed findings as provided in rule 52. That neither the said Honorable Mac Swinford, nor the said Sixth Circuit Court of Appeals would make said findings, *which as a matter of right must be made,* by each of said courts, without demand of your petitioners, but which demand was made. And thereby your petitioners' contract with the said Morris Wholesale Liquor Distributing Co., Inc., was impaired, in violation of the 14th Amendment to the Constitution of the United States. U. S. C. A.—686.

That the order made on March 4th, affected the interest of your petitioners, as shown as follows:

EXHIBIT "A"

> "The defendant, Morris Wholesale Liquor Distributing Co., Inc., having appeared in open court through its Secretary, Edward Morris, and having advised the court that it does not desire to prosecute the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, et al, and having moved the court to dismiss its counter-claim, set off and cross petition, and the court being advised and having considered the same, it is ordered and adjudged that the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, James W. Martin, Commissioner of Revenue, H. Clyde Reeves, Commissioner of Revenue, et al, be and the same is hereby ordered dismissed, *with prejudice, at the cost of the Defendant.*"

That this order was made by the court without a hearing, over the objection of Harvey H. Smith, who had demanded that evidence be furnished of the authority of Edward Morris, and that Edward Morris be sworn as a witness that he might be cross-examined, *which is a constitutional right of your petitioners,* and of the said Harvey H. Smith, whose services as counsel in numerous actions for the said corporation have not been paid. But the said, the Honorable Mac Swinford, refused to set said cause down for hearing, and had at that date refused to sustain petitioners' motion to dismiss the plaintiffs' action for want of proper parties on the 9th day of February, and prior, as shown by the records of this court, but as a matter of fact, filed on the 21st day of January, 1940, with the said clerk. That in

order to make said motion to dismiss, a copy was filed with the Clerk and one was sent to the Judge, and on the records of this Honorable Court, *On February 9th*, appeared the following answer to the filing:

> "Motion to dismiss for want of proper parties, ordered filed. (No Auditor, Act of 1934—No Plaintiff.) No Atty Gen. Sec. 112-5 Stat.
>
> Motion to dismiss filed by defendant. (Morris Wholesale Liquor Distributing Co., Inc.,) duplicate of above."

Under the laws of Kentucky, existing at said time, no action can be dismissed over the objection of an attorney for a client by the client unless it shall be made to appear to the court that the services of the attorney have been settled for or that the opposing party has received notice of the claim of said attorney for attorney's fees, and is financially responsible; who will then be prevented from entering into any agreement of settlement without becoming liable for said fees; or if it shall appear that the said moving client has the proper authority, *which the court must find,* but is insolvent, then the *action* must be continued for the benefit of the parties interested and for the benefit of counsel.

But the court ignored these well-established principles of law in Kentucky, and refused to grant a hearing or to receive any evidence concerning liability to petitioners or Harvey H. Smith as requested.

11. That it was necessary, under the laws of Kentucky, when said motion was presented for parties, to allow the filing of said petition, and to

allow the issuing of summons as a matter of right, to the Attorney General of the State, which is required by the Code of Kentucky and Rule 5 (e) United States Rules, and on the successor of James W. Martin as Internal Revenue Commissioner, in order that they may make a proper showing, or proper objection, or inform the court why the said H. Clyde Reeves had not been revived as a party within six months to the said James W. Martin, which under 26 Kentucky Reporter Bensinger vs. Funk, 656 and decisions from 1826 down to and including the present time, had been the law of Kentucky, and which decisions provide that where the time to revive is passed, the party to the action disappears by operation of law, and no motion to dismiss the name of his counsel shall be necessary, but that said counsel who appear thereafter, are subject to the penalties provided by the Statute. All of which was presented to the Sixth Circuit Court of Appeal by mandamus, and all of which would have been presented to said court by appeal, but that the said order entered on April 29, 1940, settling this cause, and the judgment dismissing the said cross-petition, are, under the decisions of the Sixth Circuit Court, U. S., void, and under other existing decisions at said time, no appeal can be allowed from a void judgment or order of the court. That for this reason and other reasons, an application was made for a mandamus to direct the respondent Honorable Mac Swinford to vacate said order, and to substitute for Morris Wholesale Liquor Distributing Co., Inc., the names of your petitioners; and therein your petitioners made motion for findings, and the said Sixth Circuit Court of Appeals refused said findings, and re-

fused to make findings or offer any relief to your petitioners, but entered an order on May 15, 1940, arbitrarily denying said mandamus without giving any reasons therefor—making no findings.

Petitioners allege Clifford Smith, contract attorney, alleged, not authorized to appear by law, at no time. (See affidavit.) Sec. 112-5 Stat.

That the action of both courts, the Sixth Circuit Court of Appeals, and the United States District Court for the Eastern District of Kentucky, violated the codes and laws of the State of Kentucky and violated the rules of the Supreme Court of the United States, 52 (A), and violated the 14th and 5th Amendments to the Constitution of the United States, and denied to your petitioners due process of law and the equal protection of the laws of the United States. That in the plain mandatory provisions of the statutes of the State of Kentucky, and the United States, the Honorable Mac Swinford either repudiated or ignored them, and in the application of your petitioners to the Circuit Court of Appeals for the Sixth Circuit, the said court refused, either to examine grounds there alleged, or affirm the action of the said Respondent, the Honorable Mac Swinford. That the conduct and the action of the respective Respondent courts, in denying complete and absolute relief to your petitioners, is a denial of due process of law and the equal protection of the laws of the Constitution of the United States, Amendments 4, 14 and 7.

The Acts of 1934-1936, of Kentucky, The Beverage Control Act of 1934, the Liquor Tax Act of 1936, and the Beverage Control Act of 1938, impaired the

contract of your petitioners made on May 15th, 1938, and the enforcement thereof; and refusal of the said Martin and the said Reeves and the non judicial acts of the said Mac Swinford, denied them equal protection of the laws of Kentucky, and the due process thereof, and issuance of attachment to Phillips, Sheriff of Franklin County, which, if enforced at all was enforced by another without legal authority, deprived the petitioners of due process and the equal protection of the laws as provided in the Constitution of the United States, 14th Amendment, 7th Amendment, and 5th Amendment.

Therefore, the said Writ should issue to the Circuit Court of Appeals to give its directions to the Honorable Mac Swinford, Respondent, and Judge, of the United States District Court for the Eastern District of Kentucky. 1st; to strike the pretended judgment of March 4th, 1940, and the JUDGMENT of April 29th, settling this cause and the claim of the Morris Wholesale Liquor Distributing Company, Inc., and to enter an order on the said counter-claim restoring it to the docket of said court, and an order making your petitioners plaintiffs in said counter-claim, and an order dismissing the petition of plaintiffs J. W. Martin and Commonwealth of Kentucky, adjudicating the costs expended by petitioners, and fixing the fees of Harvey H. Smith against pending assets attached, and an order appointing a Referee to determine the total amount of taxes which, exposed and un-exposed parties, claim against the Commonwealth of Kentucky, both import and consumers taxes, and to enter judgment for petitioners for said

sums to be distributed by the said Trustees, Hargis Langdon and Geo. S. Houston.

HARVEY H. SMITH,
Attorney for Petitioners.

Geo. S. Houston deposes on oath and says he has read the foregoing petition and that he verily believes the facts stated therein to be true.

GEO. S. HOUSTON.

Subscribed and sworn to before me this the 30th day of May, 1940.

ELSIE M. DEWALD, *Notary Public.*

My commission expires 10-29-40.

NOTE: (For convenience of Court ——— record—Exhibits are made a part of Petition, which follows).